STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

August 6, 2002

TO: PARTIES OF RECORD IN APPLICATION 01-06-029

Decision 02-07-036 was mailed on July 25, 2002, without the Joint dissent of President Lynch and Commissioner Wood. Attached herewith is the dissent.

/s/ CAROL A. BROWN
Carol A. Brown, Interim Chief
Administrative Law Judge

CAB:mnt

Attachment

A.01-06-029
D.02-07-036

Dissenting Opinion of President Loretta M. Lynch and Commissioner Carl Wood On Commissioner's Peevey's Alternate Wild Goose, Inc.'s Decision of July 17, 2002

In 1997, the Commission granted Wild Goose authority to develop, construct and operate an underground natural gas storage facility. Subsequently, in D.99-09-002, the Commission found that Wild Goose would not possess market power in its operation of the facility. On that basis, the Commission agreed to exempt Wild Goose from the Affiliate Transaction Rules that would otherwise govern its relationship with its parent company and affiliates. The Commission emphasized, however, that it reached this conclusion "because we are at the initial stage of competition in markets such as the gas storage market, where market players such as Wild Goose do not have market power, or the ability to cross-subsidize their affiliates' operations through ratepayer assets. However, we recognize that the energy markets that have been newly opened to competition are dynamic, and the marketplace is constantly changing." The Commission anticipated revisiting this issue in its Affiliate Transaction Rules proceeding and stated that, going forward, "the burden will be on the responding utilities to justify limited or partial exemption from the Rules."

In the current proceeding, Wild Goose seeks authority to expand its facilities. In this context, the ALJ asked whether changes in the market, including the addition of expansion capacity, should alter the Commission's previous finding that Wild Goose cannot exercise market power. The ALJ finds that expansion project will increase Wild Goose's market share and that Wild Goose has not persuasively established that this, in combination with other changes in the market, will not cause the utility to be able to exercise market power. The ALJ also concluded that the "contention that regulated rates will prevent Wild Goose from exercising market power is less persuasive, since the market rate authority Wild Goose holds gives it substantial flexibility to negotiate rates above an established rate floor. The rates PG&E and SoCal Gas charge may or may not effectively 'cap' Wild Goose's rates, since many factors, such as the demand for storage and availability of transportation access, will influence

market realities." For all of these reasons, the ALJ concludes that Wild Goose must be subject to the Affiliate Transaction Rules.

Without disagreeing with any of the ALJ's factual findings on this issue, the majority decision reaches a dangerously different conclusion. Where the ALJ stated that the Commission is "unable to determine, on this record, that Wild Goose cannot exercise market power," the majority states the Commission is "unable to determine whether or not Wild Goose can exercise market power." Based on this distinction, alone, the majority declines to require Wild Goose to adhere to the Affiliate Transaction Rules.

In this manner, the majority has shifted the burden of proof, as it was clearly explained in D.99-09-002. The applicant would no longer be required to demonstrate its inability to exercise market power – someone else would have to persuasively establish that they could. The Commission would no longer start with the presumption that ratepayers must be protected. It would start with the presumption that competitors must be protected. This approach constitutes nothing less than a derogation of regulatory responsibility.

Let's be clear about what Wild Goose's freedom from the Affiliate Transaction Rules means. Wild Goose's parent company is a major participant in natural gas markets. Without seeking support elsewhere in the law, California consumers would not be protected from:

1. Preferential treatment by Wild Goose of its parents or affiliates.

2. The tying of Wild Goose's utility services with those provided by its parent or an affiliate.

3. The assignment of Wild Goose's customers to its parent or an affiliate.

4. Joint business development between Wild Goose and its parent or an affiliate, including the sharing of customer leads and otherwise-proprietary business information.

5. Abuse by Wild Goose and its parent and affiliates of the confidentiality of customer-specific information.

6. Abuse by Wild Goose and its parent and affiliates of access to information about California storage inventories and the link between storage inventories and border prices.

7. A blurring of the distinction between Wild Goose and its parent or subsidiaries for purposes of its business solicitations.

8. A failure by Wild Goose to maintain contemporaneous records of its transactions with its parent or affiliates.

9. A failure by Wild Goose and its parent or subsidiaries to maintain separate corporate identities, or separate books and records.

10. A failure by Wild Goose to restrict the sharing of plant, facilities, equipment, employees, advertising, or costs.

11. A failure to report the formation of new affiliates.

12. A refusal to make available witnesses that can testify about interactions between Wild Goose and its parent or affiliates.

13. The offering of new untariffed products and services that might impair Wild Goose's ability to serve its utility customers.

The majority attempts to overcome this by precluding Wild Goose from selling storage services to its parent or an affiliate. This leaves unanswered almost all of the concerns addressed by the affiliate rules. It does nothing to stop Wild Goose from working directly with its parent, in the short term, to assert improper influence over the formation of customer contracts for Wild Goose storage services.

The majority attempts to evade the clear implications of excusing Wild Goose from these requirements by promising to take another look at the Affiliate Rules and, maybe, apply them to gas storage facilities later. This supposed interim action, with a generic promise to take further corrective and protective action later, is an example of another dangerous trend, further exemplified by the "historical procurement charge" decision issued today in A.98-07-003. In the latter proceeding, faced with an inadequate record to support its conclusion, the same majority labeled its order as "interim", and expressed the hope that someone will

step forward to provide additional evidence. Here, faced with clear reason for concern about the exercise of market power, the majority has chosen to let Wild Goose go into business with its new facilities anyway, stating that it is possible that the Commission might impose consumer protections some other time. The Commission cannot justify taking these unsupported actions by promising to fix them later. There is no apparent emergency that would justify putting ratepayers at risk when there is realistic mitigation available.

/s/ LORETTA M. LYNCH
Loretta M. Lynch
President

/s/ CARL WOOD
Carl Wood
Commissioner

San Francisco, California
July 17, 2002